Supreme Court, U.S.
FILED
JUN 6 2002
CLERK

No. 01-1374 (2)

In the Supreme Court of the United States

STACEY MORRELL, INDIVIDUALLY AND AS NEXT FRIEND FOR JOSHUA MORRELL, AN INFANT,

Petitioners,

v.

PHILIP MOCK, JUDY DEVRIENDT, RICHARD ACKERSON, DEPUTY HOLMAN, AND DEPUTY POLENSE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

JAMES G. SOTOS
Counsel of Record for Respondents Ackerson, Ploense, and Holman
KIMBERLY D. FAHRBACH
HERVAS, SOTOS, CONDON & BERSANI, P.C.
333 Pierce Road, Suite 195
P.O. Box 4109
Itasca, Illinois 60143-4109
(630) 773-4774

WILLIAM HOLLOWAY
Counsel of Record for Respondent DeVriendt
HINSHAW & CULBERTSON
222 N. LaSalle St., Suite 300
Chicago, Illinois 60601
(312) 704-3748

RONALD L. SANDACK
Counsel of Record for Respondent Mock
LOWIS & GELLEN
200 West Adams Street
Suite 1900
Chicago, Illinois 60606
(312) 364-2500

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

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QUESTIONS PRESENTED

I.

WHETHER RESPONDENTS' ENTITLEMENT TO QUALIFIED IMMUNITY IS IMPACTED BY THE QUESTIONS PRESENTED IN *HOPE v. PELZER*?

II.

WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT IT WAS NOT CLEARLY ESTABLISHED IN NOVEMBER 1998 THAT RESPONDENTS' ACT OF TEMPORARILY REMOVING PETITIONER'S BABY FROM HER CUSTODY IN ACCORDANCE WITH AN OUT-OF-STATE COURT ORDER THAT HAD BEEN FILED AND ENTERED IN AN ILLINOIS COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS?

III.

WHETHER DEPUTY SHERIFF RESPONDENTS' REASONABLE RELIANCE ON ADVICE FROM THEIR ATTORNEYS IN ENFORCING THE NEW MEXICO ORDER PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THEM?

IV.

WHETHER DEPUTY SHERIFF RESPONDENTS' ENTITLEMENT TO ABSOLUTE IMMUNITY PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THEM?

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RESPONDENTS' STATEMENT OF CLARIFICATION OF PETITIONER'S FACTS

Certain statements in Petitioner's petition require correction. First, Petitioner states that the "Illinois judge refused to enforce the New Mexico order without notice and a hearing." This statement is not accurate and is not supported by Petitioner's citation to the record. (*See* Pet'r Br. p. 3.) As reflected in the Seventh Circuit's opinion, the Illinois judge simply declined to issue a body attachment without notice and a hearing. (*See* Pet'r App. p. 3.) The record does not support Petitioner's statement that the Illinois judge indicated additional notice and a hearing were required before the New Mexico court order could be enforced. (*See* Pet'r Br. p. 3.)

Second, Respondent Mock's deposition testimony does not support Petitioner's statement that "Mock knew that Howell [the putative father] intended to remove the baby from the State of Illinois before Plaintiff would have an opportunity to seek intervention from an Illinois Court." (*Id.* at 4-6.) As the cited testimony shows, Mock knew only that Howell *might* take the child to South Carolina for paternity testing. (*See id.*)

Third, Petitioner erroneously claims that the Will County Sheriff's Deputies ("Deputy Respondents") knew that Howell was going to take the baby out of Illinois. (*See id.* at 6.) Petitioner fails to include a citation in support of this statement, and there is nothing in the record suggesting that Deputy Respondents possessed such information.

Fourth, Petitioner incorrectly states that the "Steger officers agreed with [P]etitioner's interpretation of the New Mexico order and left." (*See id.* at 4.) Again, Petitioner does not include a citation to the record to support

this statement. Further, the record below shows that no such evidence was adduced in this case.

Finally, Petitioner's statement omits numerous pertinent facts set forth in the Seventh Circuit's opinion which more fully describe the circumstances under which Petitioner's baby was removed from her custody and the roles the individual Respondents played in that act. Specifically, at the time Respondents enforced the order, Petitioner believed that John Howell was the father of her child, as she and Howell had an affair in New Mexico in 1997. (*See* Pet'r App. p. 2.) Additionally, the New Mexico court gave Petitioner an additional chance to appear and contest Howell's petition for paternity. (*Id.*) When Petitioner failed to appear at the initial hearing, the court ordered that Petitioner be served personally and set the hearing for the following day after she received that service. (*See id.*) Subsequently, Petitioner was hand-delivered a notice to appear in the New Mexico state court. (*See id.*) Petitioner ignored that notice and failed to appear. (*Id.*) It was during that second hearing that the New Mexico court entered the order at issue. (*See id.* at 2-3.)

Petitioner's statement also omits facts regarding Respondents' actions upon becoming aware of Howell's attempt to enforce the New Mexico order. First, Petitioner fails to state that Respondent DeVriendt, an assistant state's attorney, consulted with her supervisor, Respondent Mock, the chief of the civil division, regarding the validity of the New Mexico order. Upon being advised of the situation, Respondent Mock then: (1) reviewed the docket sheet from the Illinois court hearing on the body attachment request; (2) researched the Illinois Uniform Child Custody Jurisdiction Act (UCCJA); (3) checked the court's computer database to ascertain

whether any other orders or judgments had been filed in Will County; and (4) verified that the New Mexico order was valid. (*See id.* at 4.) Believing the order had to be enforced, Respondent Mock then directed Respondent DeVriendt to have Deputy Respondents enforce the order. (*Id.* at 4.)

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

RESPONDENTS' ENTITLEMENT TO QUALIFIED IMMUNITY IS NOT IMPACTED BY THE QUESTIONS PRESENTED IN *HOPE v. PELZER*

Contrary to Petitioner's suggestion (*see* Pet'r Br. p. 7.), this case does not present a question similar to the one currently before the Court in *Hope v. Pelzer*, 240 F.3d 975 (11th Cir. 2001), *cert. granted*, 122 S. Ct. 802 (U.S. Jan. 4, 2002) (No. 01-309), *cert. amended*, 122 S. Ct. 933 (Jan. 29, 2002). In amending its order granting the petition for writ of certiorari in *Hope*, this Court limited the issues to whether: (1) tying a prisoner to a "hitching post" violates clearly established rights for the purposes of qualified immunity, and (2) a constitutional right is clearly established for qualified immunity purposes "by a case presenting facts 'materially similar' to those in the plaintiff's case." *See Hope*, 122 S. Ct. 933.

Neither of the issues in *Hope* parallel any issue in this case. As this case is not a prisoner rights case, and it certainly does not involve a hitching post, Petitioner evidently presumes that both cases concern the degree of factual similarity required of existing case law for a constitutional violation to be deemed clearly established.

Petitioner's attempt to link the two cases on the basis of such a proposition is misguided.

In *Hope* this Court is faced with the specific question of whether a previous case, *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), "clearly established for qualified immunity purposes" that tying the plaintiff to a hitching post was unconstitutional. The answer to the question may depend upon the Court's selection of some standards to govern the degree of factual similarity required between existing case law and a set of facts confronting an official to clearly establish the constitutional right at issue. In *Hope* the Eleventh Circuit held that a case must have "materially similar facts" to satisfy this threshold, and *Gates* did not meet that criteria. Accordingly, one question this Court may reach in *Hope* is whether the Eleventh Circuit's "material similarity" requirement comports with this Court's rejection of the "fundamentally similar" standard in *United States v. Lanier*, 520 U.S. 259 (1997).[1]

This Court's resolution of these issues in *Hope* does not affect the application of qualified immunity in this case because there is not even a remotely analogous case which would have put respondents on notice that their conduct was constitutionally infirm. In fact, Petitioner's brief is devoid of any case—from this Court, the Seventh Circuit or anywhere else—that bears any resemblance to the challenged conduct in this case. Instead, Petitioner argues that a reasonable official in Respondents' position would have realized it was obvious that what they

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[1] In *Lanier* the Court examined the "fundamentally similar" standard in the context of a criminal prosecution of a state official for civil rights violations under 18 U.S.C. §242, but equated the "fair warning" prerequisite for criminal liability with qualified immunity from civil liability.

were doing was unconstitutional. *See Brokaw v. Mercer County*, 235 F.3d 1000, 1022 (7th Cir. 2000) (instead of identifying a closely analogous case, a plaintiff may establish a clearly established constitutional right by showing that the violation was so obvious that a reasonable person would have known of the unconstitutionality of the conduct at issue). *See also Lanier*, 520 U.S. at 271 (noting that the absence of precedent prohibiting welfare officials from selling foster children into slavery would not entitle officials to immunity against such allegations). Respondents do not contest that a plaintiff may defeat a qualified immunity defense in this manner. Here, however, the Seventh Circuit expressly considered and rejected Petitioner's claims of obviousness, reasoning that Respondents' interpretation of the law and procedures required to enforce the order were reasonable. (Pet'r App. pp. 18-19.)

Hope thus concerns a distinct application of the qualified immunity analysis—the degree of factual similarity required of a previous case in order to clearly establish the constitutional right at stake. Petitioner, on the other hand, relies not on a factually similar case but on broad general propositions and the "obviousness" of Respondents' conduct to defeat their qualified immunity defense. As a result, any standard of factual similarity enunciated in *Hope* will be immaterial to analyzing the Seventh Circuit's holding that these Respondents are afforded the protections of qualified immunity. Therefore, *Hope* should not serve as a basis for granting the writ of *certiorari* in this case.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT IT WAS NOT CLEARLY ESTABLISHED IN NOVEMBER 1998 THAT RESPONDENTS' ACT OF TEMPORARILY REMOVING PETITIONER'S BABY FROM HER CUSTODY IN ACCORDANCE WITH AN OUT-OF-STATE COURT ORDER THAT HAD BEEN FILED AND ENTERED IN AN ILLINOIS COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS

The Seventh Circuit held that, although Respondents violated Petitioner's due process rights by enforcing the New Mexico court order before providing Petitioner with notice and an opportunity to be heard in Illinois, Respondents were entitled to qualified immunity for temporarily transferring custody of Petitioner's child. (*See* Pet'r App. pp. 16-19.) Contrary to Petitioner's assertion, this grant of immunity was not based on the mere absence of an "authoritative" case with analogous circumstances. (Pet'r Br. pp. 7-8.) Instead, the court of appeals' conclusion was correctly premised upon finding that Respondents' enforcement of the New Mexico order was reasonable.

This reasoning comports with this Court's rulings on the qualified immunity doctrine. *See Anderson v. Creighton*, 483 U.S. 635 (1987). Indeed, this Court's rulings illustrate that qualified immunity serves to allow government officials reasonable leeway to perform their duties free from the threat of civil liability. *See Davis v. Sherer*, 468 U.S. 183, 196 (1984). To ensure that this purpose is fulfilled, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law" from liability. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). As this Court reiterated just last year, the dispositive question in applying qualified immunity is whether it would be clear to a reasonable official that his conduct was unlawful "in the situation he confronted." *Saucier v.*

Katz, 533 U.S. 194, 202 (2001); *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

In this case the Seventh Circuit correctly held that, although it was clear in November 1998 that a mother was entitled to due process regarding the removal of her child, it was quite unclear as to what procedures were required to protect that right—especially when another state had already afforded the mother due process. (Pet'r App. p. 17.) Simply put, there was nothing in the law that would have put Respondents on notice that the UCCJA's custody enforcement provisions, as described below, were unconstitutional or invalid, or that Petitioner was entitled to additional procedures before the order could be enforced.

In this respect, a review of the "particularized" and "specific" facts surrounding Respondents' removal of Petitioner's child shows that Respondents acted reasonably in enforcing the order and are entitled to qualified immunity. *Anderson*, 483 U.S. at 639. Initially, the New Mexico order, which had been filed in the Will County, Illinois, circuit court recited that Petitioner was "intentionally avoiding service of process" and had "wilfully failed and refused to participate" in a process to determine parentage of the baby. The order also directed that "[l]aw enforcement authorities are authorized and requested to assist" Howell in obtaining physical custody of a male child born on or about March 17, 1998.

The actions Respondents took upon being presented with this facially valid order were reasonable. *See Saucier*, 533 U.S. at 202-03. Respondent DeVriendt, the assistant state's attorney who initially reviewed the order, consulted with her superior, Respondent Mock, about the order's validity. Mock, the chief of the state's attorney's civil division, then checked the New Mexico

docket to determine if the order had been vacated, appealed, or stayed. Upon learning the order had not been modified in any way, he reviewed the local Will County docket to determine whether the New Mexico order had been modified or stayed. It had not. Instead, a certified copy of the New Mexico order was properly registered in Will County. Mock then consulted the UCCJA to ascertain whether anything else had to be done before Illinois could enforce the order.

In performing his research, Mock discovered that under the UCCJA, once an out-of-state custody order is filed in Illinois, the order "has the same effect and shall be enforced in like manner as a custody judgment rendered by a court of this state." *See* 750 Ill. Comp. Stat. 35/16 (West 1998); *accord* Unif. Child Custody Jurisdiction Act § 15 (1968). As a result, Mock concluded that the procedures for recording the New Mexico order in Illinois had been satisfied and informed Respondent DeVriendt to direct Deputy Respondents that the New Mexico order was valid and had to be enforced.

To defeat Respondents' entitlement to qualified immunity under these undisputed facts, Petitioner must point to cases establishing that a reasonable officer could not have believed that enforcing the order under these circumstances was lawful. *See Saucier*, 533 U.S. at 202-03; *Anderson*, 483 U.S. at 639. To this day, Petitioner is unable to do so. *Cf. Williams v. Blaisdell*, 173 F. Supp. 2d 574, 581 (N.D. Tex. 2001) (granting qualified immunity to police officer who removed baby from plaintiff-mother's custody pursuant to father's statements regarding the provisions of a custody order that officer did not view). Instead, Petitioner relies on general propositions to defeat Respondents' qualified immunity defense.

Specifically, Petitioner argues that Respondents acted unreasonably because it was clearly established that: (a) general principles of territorial jurisdiction prohibited enforcement of the order; (b) a putative father in Howell's position had no rights to the child so that enforcement of the order was unconstitutional; and (c) a mother had a liberty interest in her child that afforded her the protections of due process. (Pet'r Br. pp. 7-10.) Notwithstanding these contentions, none of the authorities cited by Petitioner in support of these "general propositions" indicates that it was clearly established in November 1998 that a mother was entitled to pre-enforcement notice and a hearing as a prerequisite to enforcement of a facially valid out-of-state order. *See Anderson*, 483 U.S. at 639.

A. General Principles Of Territorial Jurisdiction Did Not Establish That Petitioner Was Entitled To Pre-enforcement Notice And A Hearing

Petitioner's argument that enforcement of the New Mexico order violated fundamental principles of territorial jurisdiction is incorrect. The cases Petitioner cites stand only for the proposition that a state cannot enforce its own order in another state and that a state may establish its own rules for enforcement of an out-of-state court order. *See Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977); *McElmoyle ex rel. Bailey v. Cohen*, 13 Pet. (38 U.S.) 312, 325 (1839). Neither case even tangentially supports Petitioner's contention that a state is prohibited from enforcing another state's order.

To the contrary, a state must give full faith and credit to judicial proceedings of another state. *See* U.S. Const. art. IV, § 1, cl. 1. Otherwise, a state would be free to act

as an independent foreign sovereignty and "ignore obligations created under the laws or by the judicial proceedings of" other states. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935). The repercussions of such a scheme are the prevalence of forum shopping, with unsatisfied parties simply traveling from state to state relitigating the same issue until he is able to obtain a favorable result.

In recognition of such schemes, in 1968, the UCCJA was enacted to (1) deter the unilateral removal of children from one state to another in order to obtain foreign custody awards, (2) avoid re-litigation of custody decisions of other states, and (3) facilitate enforcement of custody decrees of other states. *See, e.g.*, Unif. Child Custody Jurisdiction Act § 1; 750 Ill. Comp. Stat. 35/2 (West 1998); *Wilkinson v. Russell*, 182 F.3d 89, 98 (2d Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000); *Dagher v. Dagher*, 495 N.E.2d 1004, 1006 (Ill. App. Ct. 1986). Accordingly, the UCCJA provides that a court "*shall* recognize and enforce an initial or modification decree of a court of another state" that has adopted the UCCJA or similar provisions. *See* Unif. Child Custody Jurisdiction Act § 13; 750 Ill. Comp. Stat 35/14 (West 1998). As the 1999 commentary to the UCCJA advises, a state's recognition and enforcement of an out-of-state order is *mandatory* under this section. *See* Unif. Child Custody Jurisdiction Act § 13 commentary.

In this respect, the UCCJA version adopted in Illinois provides that an out-of-state order filed in the office of the clerk of any circuit court of Illinois is to be treated as a judgment entered by an Illinois court. *See* 750 Ill. Comp. Stat. 35/16 (West 1998); *accord* Unif. Child Custody Jurisdiction Act § 15. Section 16 is the only procedural provision contained in the UCCJA regarding the

enforcement of out-of-state orders; there is no other provision stating that, before a state enforces an out-of-state order, it must serve the opposing party with additional notice. To the contrary, under the UCCJA an out-of-state order is enforceable as soon as it is filed in the state. *See Gasaway v. Gasaway*, 616 N.E.2d 610, 613 (Ill. App. Ct. 1993); *In re Mauro*, 543 N.E.2d 856, 858 (Ill. App. Ct. 1989); *Roehl v. O'Keefe*, 256 S.E.2d 375, 377 (Ga. 1979); *Grun v. Grun*, 496 A.2d 1183, 1187 (Pa. Super. Ct. 1985); *Holm v. Smilowitz*, 840 P.2d 157, 164 (Utah App. Ct. 1992). Under these circumstances, the principles of territorial jurisdiction on which Petitioner relies are inapplicable. Not only does the UCCJA expressly allow states to enforce each other's custody orders, but the absence of any notice provision indicates that notice is not required before such enforcement.[2]

B. This Court's Ruling In *Michael H. v. Gerald D.* Did Not Establish That Petitioner Was Entitled To Pre-enforcement Notice With Respect To The New Mexico Order

Petitioner's argument that Respondents should have refused to enforce the order because the law is clear that Howell, a "potential father," is not afforded constitutional protections is similarly flawed. In *Michael H. v. Gerald*

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[2] Certainly, had the National Conference of Commissioners intended there to be any other requirements before a state can enforce an out-of-state custody order, it could have included such a provision in the UCCJA, as it did in the Uniform Enforcement of Foreign Judgments Act (UEFJA). *See* Unif. Enforce. Foreign J. Act §§ 3, 8 (1964); 735 Ill. Comp. Stat. 5/12-650 *et seq.* (West 1998). Nevertheless, the UCCJA, which was enacted after the UEFJA, states that the only requirement is filing the order in the other state. *See id.*

D., 491 U.S. 110 (1989), the case Petitioner cites in support of her argument, a plurality of this Court upheld a California law that precluded a putative father from establishing paternity over a child born into another man's marriage. *Michael H.*, 491 U.S. at 127. Contrary to Petitioner's apparent belief, this Court did not hold that the states are prohibited from granting a putative father the right to establish paternity over his child under such circumstances. In fact, in casting the decisive vote in *Michael H.*, Justice Stevens concurred only in the judgment, stating that he assumed the father could have a protected liberty interest in the child. *Id.* at 133 (Stevens, J., concurring in judgment).

Several state courts have since held that, even if a putative father does not have a liberty interest under the federal due process clause, a putative father does have rights pursuant to that state's statutes or constitution. *See* 750 Ill. Comp. Stat. 50/1 *et seq.* (West 2000); *In Re Kirchner*, 649 N.E.2d 324 (Ill.) *cert. denied*, 515 U.S. 1152 (1995); *State v. Stone*, 474 S.E.2d 554, 561 (Va. 1996); *Ban v. Quigley*, 812 P.2d 1014 (1990), *review dismissed by* 820 P.2d 643 (1991); *In re J.W.T.*, 872 S.W.2d 189, 196-97 (Tex. 1994); *Smith v. Jones*, 566 So.2d 408 (La. Ct. App.), *writ denied sub nom., Kemph v. Nolan*, 569 So.2d 981 (La. 1990); *J.W.P. v. W.W.*, 604 A.2d 695 (N.J. 1990), *aff'd*, 604 A.2d 603 (1991); *M.J.C. v. D.J.*, 572 N.E.2d 562 (Mass. 1991); *Van Nostrand v. Oliveieri*, 427 So.2d 374 (Fla. Dist. Ct. App. 1993); *Weidenbacher v. Duclos*, 661 A.2d 988, 999 (Conn. 1995). Indeed, over two-thirds of the states now give putative fathers a right to rebut the presumption that a child born in wedlock is the issue of the marriage. *See Weidenbacher*, 661 A.2d at 999 (citing Traci Dallas, *Rebutting the Marital Presumption: A Development Relationship Test*, 88 Colum. L. Rev. 369, 373-74 (1988)).

Under these circumstances, Petitioner's assertion that Respondents should have ignored the New Mexico order because it contravenes the "principle" of *Michael H.* is misguided. Nothing in *Michael H.* limits the protections a state may bestow a putative father under that state's own constitution. Likewise, *Michael H.* is silent on what pre-enforcement procedures are necessary before an out-of-state custody order may be enforced. Consequently, *Michael H.* does not assist Petitioner in her quest to show that it was clearly established that she was entitled to pre-enforcement notice before Respondents could enforce the order.

C. Cases Holding That A Mother Has A Liberty Interest In Her Child Did Not Establish That Petitioner Was Entitled To Pre-enforcement Notice And A Hearing With Respect To The New Mexico Order

Respondents readily acknowledge that a mother has a liberty interest in the custody of her child. However, that right is not absolute, and due process is satisfied so long as she receives notice and an opportunity to be heard. *See Matthews v. Eldridge*, 424 U.S. 319 (1976); *Draghi v. County of Cook*, 184 F.3d 689, 693 (7th Cir. 1999). In this case, Petitioner indisputably received notice and an opportunity to be heard prior to issuance of the New Mexico order at issue, which is precisely what the UCCJA requires. *See* Unif. Child Custody Jurisdiction Act § 4; 750 Ill. Comp. Stat. 35/5 (West 1998). In fact, she received hand-delivered notice to appear in the New Mexico court for purposes of addressing Howell's specific petition regarding custody. Thus, Petitioner received her due process. *See Matthews*, 424 U.S. at 348-49. She simply failed to take advantage of her opportunity to be heard.

Although the Seventh Circuit ultimately concluded that the federal due process clause entitled Petitioner to additional pre-enforcement procedures in Illinois in addition to the aforementioned pre-judgment procedures she received in New Mexico, the Court found nothing in the law that would have given Respondents fair warning that these additional procedures were required. Indeed, the Court of Appeals arrived at its conclusion that Petitioner was entitled to pre-enforcement notice by extrapolating general propositions from other due process cases. Accordingly, since Respondents acted in accordance with a reasonable interpretation of the law, albeit a different interpretation than the one ultimately reached by the Seventh Circuit, they were entitled to qualified immunity. (*See* Pet'r App. pp. 16-19.)

Moreover, additional protections were available to Petitioner after custody of her child was transferred. Indeed, due process is denied only if the state fails to provide adequate machinery for the correction of errors that occur in legal proceedings. *See Ellis v. Hamilton*, 699 F.2d 510, 514 (7th Cir. 1982). Here, Petitioner could have pursued post-deprivation proceedings in New Mexico. Additionally, Petitioner could have sought redress in Illinois, as five months passed between the time the New Mexico order was entered and the time Deputy Respondents enforced the order. Petitioner even knew that Howell was trying to have the order enforced prior to the time Deputy Respondents came to her house because another law enforcement agency notified her of the existence of the order and Howell's efforts to enforce it.

Petitioner failed to take advantage of any of these opportunities to challenge what she considered to be an invalid order. Instead, she waited until after Respondents enforced the order to do anything. Even then,

however, Petitioner obtained relief through the Illinois court system. As such, Petitioner received all the due process that was required. *See Ellis*, 699 F.2d at 514.

III.

DEPUTY SHERIFF RESPONDENTS' REASONABLE RELIANCE ON ADVICE FROM THEIR ATTORNEYS IN ENFORCING THE NEW MEXICO ORDER PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THEM

The petition for certiorari should be denied as to Petitioner's claims against the Deputy Sheriff Respondents on the alternative basis that they reasonably relied on attorney advice in enforcing the New Mexico order. Courts have repeatedly held that in situations where reasonable attorneys could disagree on the interpretation of a law, an official who reasonably acts pursuant to an attorney's advice is entitled to qualified immunity. *See, e.g., Davis v. Zirkelbach*, 149 F.3d 614, 619-20 (7th Cir. 1998), *cert. denied*, 525 U.S. 1121 (1999); *Hollingsworth v. Hill*, 110 F.3d 733, 740-41 (10th Cir. 1997); *England v. Hendricks*, 880 F.2d 281, 284 (10th Cir. 1989); *Lavicky v. Burnett*, 758 F.2d 468, 476 (10th Cir. 1985); *Arnsberg v. United States*, 757 F.2d 971, 981 (9th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986). This rule is based upon the principle that the attorney's advice prevented the officials from knowing that their actions were unconstitutional. *See Davis*, 149 F.3d at 619-20.

While following routine advice of counsel does not always entitle a public official to immunity (*see Davis*, 149 F.3d at 620; *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482, 1488-89 (10th Cir.), *cert. denied*, 498 U.S. 920 (1990)), following attorney advice that is specifically tailored to a "more unusual" situation does warrant application of

qualified immunity, even when the law was clearly established. *See Davis*, 149 F.3d at 620. This case qualifies as such a situation.

Certainly, the situation presented to Deputy Respondents was anything but typical. They were presented with an out-of-state custody order that authorized them to transfer custody of the baby from its mother to Howell. In the face of this situation, Deputy Respondents did not act hastily, as they were not ignorant of the consequences of enforcing the order. Instead, they consulted the County's assistant state's attorney Respondent DeVriendt and asked for guidance. In turn, Respondent DeVriendt consulted with her supervisor, Respondent Mock, and made him aware of the circumstances surrounding the order.

At the time, Mock was chief of the civil division of the State's Attorney's Office and legal advisor to the Sheriff's Department. Upon being advised of the situation, Mock reviewed the UCCJA, docket sheet, and computer records. Mock proceeded to interpret the order knowing that Deputy Respondents would rely on his advice to enforce the order. *See Davis*, 149 F.3d at 620. Mock then told Respondent DeVriendt to inform Deputy Respondents that the order was valid and had to be enforced. Further, Mock told Sheriff's Lieutenant Van Dyke that if he did not enforce the order, he could be held in contempt.

Against this backdrop, Deputy Respondents are entitled to qualified immunity even if it was clearly established that it was unconstitutional to temporarily remove the baby from Petitioner's custody. Mock administered specific direction to Deputy Respondents that the New Mexico order had to be enforced against Petitioner; he did not offer broad advice about the validity of custody orders or the duties of law enforcement officials in gen-

eral. *See Hollingsworth*, 110 F.3d at 741, 742 n.3. Additionally, there was no delay between the time Mock administered his direction to the Deputy Respondents and the time they acted upon it so that the validity of the order could have changed. *See Davis*, 149 F.3d at 620.

Indeed, that Deputy Respondents consulted their legal advisor and then followed that advice tends to vitiate any argument that they knew or should have known that their actions violated Petitioner's constitutional rights. *See McElveen v. County of Prince William*, 725 F.2d 954, 958 n.5 (4th Cir.), *cert. denied, Prince William County v. Hutto*, 469 U.S. 819 (1984). Truly, Deputy Respondents had no reason to believe that Mock's advice was erroneous. *See Davis*, 149 F.3d at 620; *Arnsberg*, 757 F.2d at 981 (officers are simply not required to "second-guess the legal assessments of trained lawyers"). As a result, because Deputy Respondents had an "objectively reasonable" belief in the lawfulness of their actions, and Mock's direction essentially prevented them from knowing that their actions were unconstitutional, they are independently entitled to qualified immunity. *See Hollingsworth*, 110 F.3d at 742; *Arnsberg*, 757 F.2d at 981.

IV.

DEPUTY SHERIFF RESPONDENTS' ENTITLEMENT TO ABSOLUTE IMMUNITY PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THEM

As the Seventh Circuit held that all Respondents are entitled to qualified immunity for their actions, it did not reach Deputy Respondents' alternative argument that absolute immunity also serves to bar Petitioner's claims against them. As the federal district court correctly held, however, Petitioner's claims against Deputy Respondents

are also barred under the doctrine of absolute immunity. (*See* Pet'r App. pp. 27-29.)

It is well settled that a public official who executes a facially valid court order is immune from liability for any acts authorized by that order. *See, e.g., Henry v. Farmers City State Bank*, 808 F.2d 1228, 1238-39 (7th Cir. 1986). As the First Circuit has noted, a nonjudicial officer who is delegated judicial duties in aid of a court should not be a "lightning rod" for harassing litigation. *Kermit Construction Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976). Indeed, allowing an individual to bring a § 1983 suit against a public official for damages resulting from his execution of a court order would require the official to act as an appellate court and force him to review the validity of a court order before acting on it. *Henry*, 808 F.2d at 1239; *see also Wollin v. Gondert*, 192 F.3d 616, 624 (7th Cir. 1999). Such a result is "obviously untenable." *Henry*, 808 F.2d at 1239. If a party wishes to contest the legality of a court order, the procedure is to appeal that order, not to sue the official responsible for its execution. *Id.* Accordingly, only if the official knew the order constituted "an unacceptable error indicating gross incompetence or neglect of duty" would the official lose his immunity.[3] *Wollin*, 192 F.3d at 624; *accord Malley v. Briggs*, 475 U.S. 335, 345 n.9 (1986).

Here there is no evidence that the New Mexico court order authorizing Deputy Respondents to transfer custody of the baby was entered pursuant to a neglect of

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[3] While the Seventh Circuit in *Wollin* did not specifically state that its decision rested on absolute immunity grounds, it approvingly relied on the *Henry* court's absolute immunity analysis. *Wollin*, 192 F.3d at 624-25.

duty or gross incompetence. The order contained the judge's signature, listed a date, and identified the parties involved. It indicated that Petitioner had notice of the hearing and that Petitioner was willfully failing to participate in the process. The order then provided that law enforcement officials were authorized to assist Howell in obtaining physical custody of the baby, and only after Howell "obtain[ed] physical custody" *and* undertook a parentage determination would the court relinquish jurisdiction. Finally, a Will County court stamp was affixed to the order, which showed that it had been filed in Illinois pursuant to 750 Ill. Comp. Stat. 35/16 (West 1993). In other words, the order did not in any way appear incomplete or invalid on its face so that an inference could be made that the judge who issued it made "an unacceptable error indicating gross incompetence or neglect of duty." *See Wollin*, 192 F.3d at 624.

To find that Deputy Respondents should have conducted any more inquiry into the validity of the New Mexico order prior to enforcing it would obligate them to perform a duty they do not have. Deputy Respondents' only role was to enforce the order, an act for which they are entitled to immunity. *See Henry*, 808 F.2d at 1239; *Tymiak v. Embedded*, 676 F.2d 306, 308 (8th Cir. 1982); *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980); *Lockhardt v. Hoenstine*, 411 F.2d 455, 460 (3d Cir.), *cert. denied*, 396 U.S. 941 (1969). Therefore, because the doctrine of absolute immunity provides an alternate basis for affirming the Seventh Circuit's judgment in favor of Deputy Respondents, the petition for a writ of *certiorari* as to Petitioner's claims against Deputy Respondents should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES G. SOTOS
Counsel of Record for Respondents Ackerson, Ploense, and Holman
KIMBERLY D. FAHRBACH
HERVAS, SOTOS, CONDON & BERSANI, P.C.
333 Pierce Road, Suite 195
P.O. Box 4109
Itasca, Illinois 60143-4109
(630) 773-4774

WILLIAM HOLLOWAY
Counsel of Record for Respondent DeVriendt
HINSHAW & CULBERTSON
222 N. LaSalle St., Suite 300
Chicago, Illinois 60601
(312) 704-3748

RONALD L. SANDACK
Counsel of Record for Respondent Mock
LOWIS & GELLEN
200 West Adams Street
Suite 1900
Chicago, Illinois 60606
(312) 364-2500